

COLUMBIA LAW REVIEW

SIDEBAR

VOL. 113

MAY 2, 2013

PAGES 88–101

COORDINATION RECONSIDERED

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At the heart of American campaign finance law is the distinction drawn by the Supreme Court in *Buckley v. Valeo* between contributions and expenditures.¹ According to the Court, contributions may be limited because they pose the dangers of corruption and the appearance of corruption, but expenditures pose no such dangers and therefore may not be limited. The distinction between the two types of campaign spending turns not on the form—the fact that contributions proceed from a donor to a candidate, while expenditures involve direct efforts to influence the voters—but on whether the campaign practice implicates the corruption concerns that the Court has held justify campaign finance regulation. As a result, not all expenditures are exempt from restriction.² *Independent* expenditures undertaken by an individual or group in support of a candidate or against her opponent are constitutionally protected from limitation. In the Court’s view “[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”³ But, as *Buckley* found, expenditures by supporters of a candidate that are *coordinated* with the candidate benefited are in reality “disguised contributions” that pose the same corruption dangers as outright contributions.⁴ Congress can regulate such coordinated expenditures as contributions, and, indeed, has done so⁵ in order to distinguish between “independent expressions of an individual’s views and the

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¹ 424 U.S. 1, 20–21 (1976) (per curiam).

² So, too, not all contributions can be limited. Because the Court has found that donations to committees supporting or opposing ballot propositions do not influence the election of corruptible officials, such donations cannot be limited. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 297–99 (1981). Moreover, contribution limits that are so low that they impair the ability of candidates to compete effectively have also been held unconstitutional. See *Randall v. Sorrell*, 548 U.S. 230, 236–37 (2006).

³ *Buckley*, 424 U.S. at 47.

⁴ *Id.* at 46–47.

⁵ See 2 U.S.C. § 441a(a)(7)(B) (2006) (treating expenditures made “in cooperation, consultation, or concert” with candidates and parties as contributions); see also *id.* § 431(17) (defining “independent expenditure”).

use of an individual's resources to aid in a manner indistinguishable in substance from the direct payment of cash" to a candidate.⁶ As the Supreme Court has noted approvingly, "Congress drew a functional, not a formal, line between contributions and expenditures."⁷ This coordination/independence distinction is, thus, critical to maintaining the integrity of the foundational contribution/expenditure distinction.

I. THE EMERGENCE OF SINGLE-CANDIDATE SUPER PACS

In the 2012 elections, however, the coordination/independence distinction at the center of the contribution/expenditure divide essentially collapsed due to the emergence of single-candidate Super Political Action Committees (PACs). By one recent count, seventy-five Super PACs dedicated to advancing the electoral fortunes of specific individual candidates were active in the 2011–12 election cycle, and these single-candidate Super PACs together spent more than \$288 million, or roughly 45% of all Super PAC spending in the election.⁸ These organizations—including groups such as Restore Our Future, Priorities USA Action, Winning Our Future, Texas Conservatives Fund, and Independence Virginia PAC—were major players in the election but operated effectively outside the reach of the federal laws limiting contributions to federal candidates or to organizations that give money to candidates.⁹ Yet each of these organizations existed solely to promote or oppose one and only one candidate: Restore Our Future raised more than \$153 million and spent more than \$142 million on ads exclusively on behalf of Mitt Romney in the presidential primaries and general election, while Priorities USA Action raised \$79 million and spent \$66 million on ads solely to aid President Barack Obama.¹⁰ In the Republican presidential primaries, in particular, single-candidate Super PACs played a crucial role in sustaining candidates like Newt Gingrich and Rick Santorum. Winning Our Future, which was dedicated entirely to aiding Gingrich, raised and spent nearly as much money (approximately \$17 million) as Gingrich's official campaign committee

⁶ H.R. Rep. No. 94-1057, at 59 (1976) (Conf. Rep.), reprinted in 1976 U.S.C.C.A.N. 946, 974.

⁷ *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado Republican II)*, 533 U.S. 431, 443 (2001).

⁸ See Taylor Lincoln, Pub. Citizen, *Super Connected: Outside Groups' Devotion to Individual Candidates and Political Parties Disproves the Supreme Court's Key Assumption in Citizens United that Unregulated Outside Spenders Would Be 'Independent'* 10 (2013) [hereinafter *Public Citizen*], available at <http://www.citizen.org/documents/super-connected-march-2013-update-candidate-super-pacs-not-independent-report.pdf> (on file with the *Columbia Law Review*).

⁹ See Ctr. for Responsive Politics, *2012 Outside Spending*, by Super PAC, OpenSecrets.org [hereinafter *Ctr. for Responsive Politics, 2012 Outside Spending*], <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=O&type=S&chrt=V> (on file with the *Columbia Law Review*) (last updated Apr. 11, 2013) (detailing Super PAC spending during 2012 election cycle).

¹⁰ *Id.* (totaling Restore Our Future's and Priorities USA Action's spending, respectively); see also *Public Citizen*, supra note 8, at 7, 20–23.

(approximately \$23 million).¹¹ The Red, White & Blue Fund supported precisely one candidate—Santorum—and boosted his total primary spending by one-third, adding \$7.5 million to the approximately \$22 million spent by Santorum’s campaign committee.¹²

Nor were single-candidate Super PACs confined to the presidential race. In the hotly contested race for Virginia’s United States Senate seat, the \$14.5 million raised by Republican candidate George Allen was significantly augmented by the \$5.2 million raised by the Independence Virginia PAC, which spent all its money on ads attacking Allen’s Democratic opponent, Tim Kaine.¹³ Ted Cruz’s campaign to win the Republican primary for Texas’s United States Senate seat was successful despite the nearly \$5.9 million spent by the Texas Conservatives Fund, exclusively for Cruz’s primary opponent, David Dewhurst.¹⁴ Altogether more than half of the Super PACs and independent committees that focused solely on congressional races were single-candidate organizations.¹⁵

These groups not only devoted all their spending to a single candidate, but they also frequently enjoyed close structural relationships with the candidates they backed. The single-candidate Super PACs were frequently organized and directed by former staffers of that candidate. For example, Restore Our Future was founded on the eve of the 2011–12 election cycle by several former Romney aides, including treasurer Charles R. Spies, general counsel to Romney’s unsuccessful run for the 2008 Republican presidential nomination, and board member Carl Forti, the 2008 Romney campaign’s political director;¹⁶ Priorities USA Action was set up by two of Obama’s former White House aides, Bill Burton and Sean Sweeny;¹⁷ Winning Our Future was founded by Becky Burkett, who also worked for American Solutions for Winning the Future, a group Gingrich used to run, and Rick Tyler, a senior advisor for the Super PAC, had also worked as a press secretary and

¹¹ See Ctr. for Responsive Politics, 2012 Outside Spending, *supra* note 9 (totaling Winning Our Future’s spending); Ctr. for Responsive Politics, Newt Gingrich (R), OpenSecrets.org, <http://www.opensecrets.org/pres12/candidate.php?id=n00008333> (on file with the *Columbia Law Review*) (last visited Apr. 22, 2013) (totaling Gingrich campaign spending in 2012 election cycle).

¹² See Ctr. for Responsive Politics, 2012 Outside Spending, *supra* note 9 (totaling Red, White & Blue Fund’s spending); Ctr. for Responsive Politics, Rick Santorum, OpenSecrets.org, <http://www.opensecrets.org/pres12/candidate.php?id=N00001380> (on file with the *Columbia Law Review*) (last visited Mar. 25, 2013) (totaling Santorum campaign spending in 2012 election cycle).

¹³ See Ctr. for Responsive Politics, 2012 Outside Spending, *supra* note 9 (totaling Independence Virginia PAC’s spending); see also Public Citizen, *supra* note 8, at 28–29.

¹⁴ See Public Citizen, *supra* note 8, at 27–28.

¹⁵ See *id.* at 17, 23–33.

¹⁶ Ctr. for Responsive Politics, Restore Our Future, OpenSecrets.org, <http://www.opensecrets.org/outsidespending/detail.php?cmte=C00490045&cycle=2012> (on file with the *Columbia Law Review*) (last visited Apr. 22, 2013).

¹⁷ Ctr. for Responsive Politics, Priorities USA Action, OpenSecrets.org, <http://www.opensecrets.org/outsidespending/detail.php?cmte=C00495861&cycle=2012> (on file with the *Columbia Law Review*) (last visited Apr. 22, 2013).

spokesman for Gingrich.¹⁸ In many cases, the candidate's campaign committee and the supportive Super PAC relied on the same campaign vendors, such as pollsters, media buyers, television ad producers, and fundraisers, as the candidates they aided.¹⁹ Candidates raised funds for the Super PACs backing them, and representatives of the candidates met with the staffs of and donors to their supportive Super PACs. Republican presidential contender Rick Perry even used footage from his Super PAC's ad for his own campaign ads, and Foster Friess, the principal donor to Santorum's Super PAC, appeared on stage with Santorum as the two celebrated Santorum's victory in the Missouri presidential primary.²⁰

In virtually all respects, then, these single-candidate Super PACs were alter egos for the official campaign committees of the candidates whom they existed to serve. The donations to and spending by these Super PACs were surely, to use *Buckley's* term, "disguised contributions" to those candidates. Many donations to these Super PACs were extraordinarily large—far larger than the maximum legally permissible donations to candidates. For instance, Sheldon and Miriam Adelson together gave Restore Our Future \$30 million, and earlier, while Newt Gingrich was still an active candidate for the Republican nomination they, together with their daughter, gave Winning Our Future \$20.5 million.²¹ In fact, at least thirty individuals and four labor unions each gave \$1 million or more to Priorities USA Action.²² By contrast, the federal monetary limit on donations to candidates in 2012 was a mere \$2,500 per candidate per election.²³ Most of the principal individual donors to single-candidate Super PACs had previously given to the candidate backed by the Super PAC but had "maxed out" the donations they were allowed to provide

¹⁸ Ctr. for Responsive Politics, *Winning Our Future*, OpenSecrets.org, <http://www.opensecrets.org/outsidespending/detail.php?cmte=C00507525&cycle=2012> (on file with the *Columbia Law Review*) (last visited Apr. 22, 2013).

¹⁹ See T.W. Farnam, *Vendors Finesse Law Barring 'Coordination' by Campaigns*, Independent Groups, Wash. Post, Oct. 13, 2012, http://articles.washingtonpost.com/2012-10-13/politics/35501220_1_paul-s-ryan-campaign-finance-laws-democratic-congressional-candidates (on file with the *Columbia Law Review*) ("[A]t least 30 political consulting companies have been hired by both a campaign or party and an independent group . . .").

²⁰ Richard Briffault, *Super PACs*, 96 Minn. L. Rev. 1644, 1681 (2012).

²¹ See Ctr. for Responsive Politics, *Adelson, Sheldon G. & Miriam O: Donor Detail*, OpenSecrets.org, http://www.opensecrets.org/outsidespending/donor_detail.php?cycle=2012&id=U0000000310&type=I&super=N&name=Adelson%2C+Sheldon+G.+%26+Miriam+O (on file with the *Columbia Law Review*) (last visited Apr. 22, 2013).

²² See Ctr. for Responsive Politics, *Priorities USA Action Contributors*, OpenSecrets.org, <http://www.opensecrets.org/pacs/pacgave2.php?cmte=C00495861&cycle=2012> (on file with the *Columbia Law Review*) (last visited Apr. 22, 2013).

²³ See FEC, *Contribution Limits for 2011-2012*, available at <http://www.fec.gov/info/contriblimits1112.pdf> (on file with the *Columbia Law Review*) (providing \$2,500 individual limit for 2012 election cycle). Under federal law, the primary and general elections are treated as separate elections, so a donor could give a total of \$5,000 to a candidate, like Mitt Romney or Barack Obama, who ran in both. So, too, each spouse in a married couple can give the maximum individual amount, so a couple could have given Romney or Obama \$10,000 across the entire 2011-12 election cycle.

that candidate.²⁴ Moreover, many donors had significant interests that would be affected by the outcome of the election they sought to influence, and were actively engaged in lobbying federal lawmakers on a host of tax, regulatory, and other policy issues.²⁵ By giving to a single-candidate Super PAC, these donors were able to provide financial support to their preferred candidates at many times the legal limit and, presumably, enjoy greatly increased gratitude from the candidates who benefited from the Super PAC's spending.

II. COORDINATED AND INDEPENDENT EXPENDITURES

Yet, despite the commitment of a single-candidate Super PAC to an individual candidate and the ties between the Super PAC and that candidate, the Super PAC's campaign spending was considered legally "independent" of and not "coordinated" with that candidate. Indeed, Super PAC independence was essential to the critical campaign role they played. If a Super PAC was found to be coordinating its expenditures with the candidate it was created to support, its spending would be treated as a contribution to the candidate; individual donations to the Super PAC would be subject to the \$5,000 limit applicable to contributions to committees that contribute to candidates; and the Super PAC would be barred from accepting corporate and union contributions.

That spending by these organizations was considered legally independent of and not coordinated with the single candidates they support is proof enough of the inadequacy of our current law to deal with the Super PAC phenomenon. We need to rethink what we mean by coordination and how we draw the coordinated/independent distinction in the brave new campaign world of single-candidate Super PACs.

Current law, as embodied in the Federal Election Commission's governing regulations, provides that the spending of a nominally independent group will be considered coordinated with a candidate only if there is either some close involvement of the candidate with the group in decisions concerning the content, timing, and other relatively technical aspects of a specific ad, or if there has been some transmission of information between the candidate and the group with respect to the campaign's strategies, messages, or needs.²⁶ These rules are based on an older model of independent committee—in which the committee had independent existence long before the current election; had a set of political, ideological, and policy goals in addition to the election of a specific candidate; and, even if its spending focused on elections, supported or opposed multiple candidates, not just one. Such a group could strongly support a candidate with ads that helped the candidate, but was neither functionally tied to the candidate nor an alter ego of the candidate's own campaign committee. When such committees were the principal form of independent committee active in an election, it made some sense to require

²⁴ See Briffault, *supra* note 20, at 1678 (discussing Super PAC contributions by individuals who reached individual campaign contribution limits); see also Public Citizen, *supra* note 8, at 27–30 (discussing role of "mega-donors" in funding Super PACs and other groups aiding single congressional candidates).

²⁵ See Briffault, *supra* note 20, at 1691–92.

²⁶ See 11 C.F.R. §§ 109.20–109.23 (2012).

proof of substantial specific contacts from the candidate to the independent committee in light of the Supreme Court's determination that truly independent spending is not necessarily helpful to the candidate it is intended to benefit, which, in turn, "alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."²⁷ Such contacts establish that the committee is actually operating on behalf of the candidate. But requiring such evidence of substantial specific contacts makes little sense when the group is run by former staff of the candidate and exists solely to aid that candidate.

The case that set the pattern for defining coordinated communication was a decision of the federal district court for the District of Columbia in an enforcement action brought by the FEC against the Christian Coalition, a not-for-profit corporation focused broadly on "provid[ing] a voice in the public arena for Christians and other 'people of faith.'"²⁸ In the 1990, 1992, and 1994 elections it engaged in a significant amount of electoral activity supporting a large number of Republican candidates for federal office.²⁹ In assessing whether the organization's activities were coordinated with the candidates it backed, the court emphasized that "[c]oordination requires some to-and-fro between corporation and campaign" with respect to the organization's electoral activity.³⁰ Moreover, contact between the candidate's campaign and the outside organization, while necessary, was not, by itself, sufficient to establish coordination. The court wanted to leave space for organizations to discuss issues and policy with a candidate as part of the process of deciding whether to back the candidate. Accordingly, the court determined that coordination required contacts that involved either an express request or suggestion from the candidate to the organization, or sufficiently "substantial discussion or negotiation" between the candidate and spender over the contents, timing, or placement of an ad to make the candidate and noncandidate committee "partners or joint venturers."³¹

The *Christian Coalition* decision provided the template that shaped the FEC's coordination definition. Indeed, even after multiple revisions, the coordination regulation still looks to see whether a specific ad was sponsored at the "request or suggestion" of a candidate or political party; if a candidate or political party was "materially involved" in decisions concerning the content, audience, timing, or media chosen for the ad; or whether the ad was created following "substantial discussion" between its sponsor and the candidate or party.³² However, this emphasis on close contact or interchange with respect to specific expenditures may be said to reflect naïve thinking about the way a

²⁷ *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (per curiam).

²⁸ See *FEC v. Christian Coal.*, 52 F. Supp. 2d 45, 49 (D.D.C. 1999).

²⁹ See *id.* at 54–81 (discussing organization's activities in Montana congressional race, Georgia primaries, 1992 presidential election, North Carolina Senate race, South Carolina congressional race, Virginia Senate race, and Arizona congressional race, and distribution of voter guides and issues "scorecards" assessing performance of multiple candidates on issues of importance to organization).

³⁰ *Id.* at 93.

³¹ *Id.* at 92.

³² 11 C.F.R. § 109.21(d)(1)–(3) (2012).

candidate, or candidate's committee, and a supportive organization can coordinate. Candidates and committees don't have to talk to each other; they can communicate through the press. A candidate's committee can publicize campaign messages, themes, and strategies, and reach audiences the candidate's campaign would like to target, without sitting down with representatives of a supportive committee. This might have been a bit more cumbersome in 1999 when *Christian Coalition* was handed down, but surely today, with candidates, campaigns, parties, and political committees all maintaining websites and Facebook pages, and campaign operatives posting their latest thoughts to their Twitter accounts, direct contacts between campaigns and outside groups are unnecessary: Why do they have to meet when they can tweet?

Still, it might be appropriate to require some evidence of significant interaction in order to find that the spending of a freestanding group with preexisting policy, political, or ideological goals represents actual coordination with the candidate rather than independent support for a candidate whose views are congruent with that group's. After all, *Buckley* holds that independent spending is constitutionally protected, and completely eliminating the requirement of proof of interaction between a candidate's committee and the independent backer runs the risk that all supportive independent spending will be treated as coordinated.³³ But when a single-candidate Super PAC is created and operated by former aides to the candidate, requiring a showing of direct contact between candidate and Super PAC, let alone substantial discussion or material involvement of the candidate in the group's spending decisions, is unnecessary to establish coordination—the current staff of the candidate's committee and the former candidate staffers running the Super PAC are highly likely to share common understandings of campaign themes, tactics, and needs without direct contact. As Representative Tom Cole, the former chair of the National Republican Campaign Committee explained, “[w]hen your old consultants and your best buddies are setting them up, you can pretty much suspect that there's been a lot of discussion beforehand.”³⁴ A former FEC commissioner put it even more succinctly: “People who think alike don't need to conspire.”³⁵

III. COORDINATION IN THE AGE OF SUPER PACS

Neither the Supreme Court nor governing federal statutes actually require a showing of significant express interaction between a candidate and a supportive organization as a precondition for a finding of coordination.

³³ See, e.g., *Christian Coal.*, 52 F. Supp. 2d at 95 (explaining Supreme Court's position in *Buckley* that “the First Amendment does not allow coordination to be inferred merely from a corporation's possession of insider knowledge from a federal candidate's campaign”).

³⁴ Anna Palmer & Jim Vandehei, A New Way to Buy Real Influence, *Politico* (Oct. 24, 2011), <http://www.politico.com/news/stories/1011/66673.html> (on file with the *Columbia Law Review*).

³⁵ Shane D'Aprile, Shop Talk: A New Era in Campaign Finance, *Campaigns & Elections*, Mar. 20, 2012, <http://www.campaignsandelections.com/magazine/us-edition/314162/shop-talk-a-new-era-in-campaign-finance.html> (on file with the *Columbia Law Review*) (quoting Robert Lenhard (quoting Gore Vidal)).

Buckley explained that “prearranged or coordinated expenditures amount[] to disguised contributions.”³⁶ Direct contacts, substantial discussions, negotiations, or material involvement of the candidate’s campaign organization with the outside organization’s activities would appear to be essential for prearrangement, but under *Buckley* contribution status is not limited to prearrangement, and coordination is a much broader and more open-ended concept than prearrangement. Coordination in the dictionary sense of the “harmonious functioning of parts for effective results”³⁷ does not require prearrangement or direct contact between the coordinated groups. To be sure, *Buckley* says nothing about what it takes to establish that an independent group is coordinated with a candidate, but the Court subsequently recognized that coordination can occur “without any candidate’s approval”³⁸ and, instead, can be effectuated by a “wink or nod.”³⁹

Congress has also taken a broad approach to the definition of coordination. In the Bipartisan Campaign Reform Act of 2002 (BCRA), Congress, dissatisfied with the regulations the FEC had adopted in the aftermath of *Christian Coalition*, directed the FEC to “promulgate new regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees.”⁴⁰ Although Congress itself did not define coordination, the statute specified that the FEC’s new regulations “shall not require agreement or formal collaboration to establish coordination” and then directed that the new regulations “shall address” four factors: “(1) payments for the republication of campaign materials; (2) payments for the use of a common vendor; (3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and (4) payments for communications made by a person after substantial discussion about the communication with a candidate or political party.”⁴¹ Notably, the first three statutory factors require no contact between the candidate or the candidate’s campaign committee and the outside group spending in support of the candidate as a prerequisite for a finding of coordination. In *McConnell v. FEC*, the Supreme Court upheld this provision against the claims that it was unconstitutionally overbroad and unconstitutionally vague.⁴²

Following the enactment of BCRA and its validation in *McConnell*, the FEC did revise its coordination regulations to address the factors raised by Congress, including payments for use of a common vendor, and payments for communications directed or made by persons who previously served as employees of a candidate or political party—the two structural factors most pertinent to the activities of single-candidate Super PACs. The FEC’s original

³⁶ *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (per curiam) (emphasis added).

³⁷ Merriam-Webster’s Collegiate Dictionary 399 (deluxe ed. 1998) (defining “coordination”).

³⁸ *FEC v. Colo. Republican (Colorado Republican II)*, 533 U.S. 431, 442 (2001).

³⁹ *Id.*; accord *McConnell v. FEC*, 540 U.S. 93, 221 (2003).

⁴⁰ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 214(c), 116 Stat. 81, 95 (codified at 2 U.S.C. § 441a note (2006) (Regulations by the Federal Election Commission)).

⁴¹ *Id.*

⁴² *McConnell*, 540 U.S. at 219–23.

post-BCRA coordination regulations and other rules to implement BCRA's provisions were challenged by some of BCRA's initial sponsors and other reform groups as too limited to accomplish the goals of the statute. After extensive litigation⁴³ the FEC eventually adopted a new definition of coordination that included common vendors⁴⁴ and former employees⁴⁵ in addition to action at the "request or suggestion" of the candidate benefited⁴⁶ or following "material involvement" of or "substantial discussion" with the candidate.⁴⁷ However, the FEC limited the effectiveness of these new criteria of coordination in two respects. First, the fact that the person paying for the ad (or that person's employer) is a former employee of the candidate, his committee, or a political party only matters if that person was a former employee within 120 days of paying for a communication.⁴⁸ In effect, the significance of former employee status is purged after four months. As a result, a senior member of a candidate's staff could leave the candidate's employment on July 1 of the first year of the two-year election cycle, and by October 1 of the same year her former employee status would be irrelevant. Second, even within the 120-day period former employee or common vendor status is not enough to show coordination. Instead, the common vendor or the former employee must have used or conveyed nonpublic inside information from the

⁴³. The history of that litigation is reviewed in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008), and *Coordinated Communications*, 75 Fed. Reg. 55,947, 55,948–52 (Sept. 15, 2010).

⁴⁴. 11 C.F.R. § 109.21(d)(4) (2012).

⁴⁵. *Id.* § 109.21(d)(5).

⁴⁶. *Id.* § 109.21(d)(1).

⁴⁷. *Id.* § 109.21(d)(2)–(3). The FEC's definition of coordination has two components—a content standard, which essentially means the expenditure must be either express advocacy, an electioneering communication, or the republication of the candidate's own materials, and a conduct standard, which addresses the relationship between the candidate and the individual or group undertaking the expenditure. 11 C.F.R. § 109.21(c), (d) (2012). "Content" is generally not an issue in addressing activities of single-candidate Super PACs as these organizations' ads were consistently either express advocacy or electioneering communications. The real issue for single-candidate Super PACs is the conduct standard. In cases involving Super PACs supporting a wider range of candidates, however, ad content may also be an issue. In 2011, American Crossroads informed the FEC that it proposed to pay for advertisements intended to "improve the public's perception" of certain members of Congress "in advance of the 2012 campaign season." Holly Bailey, *American Crossroads Asks FEC for Permission to Feature Candidates in Ads*, Yahoo! News The Ticket (Oct. 13, 2011), <http://news.yahoo.com/blogs/ticket/american-crossroads-asks-fec-permission-feature-candidates-ads-150908017.html> (on file with the *Columbia Law Review*). Those members would be featured in the ads, and would help write the scripts; the ads would be "thematically similar" to the featured members' own campaign materials and would in fact be coordinated with the members. *Id.* However, the ads would not contain either express advocacy or electioneering communications within the meaning of the FEC regulation, and so did not meet the content prong of the coordinated expenditure test. As a result, three members of the six-member body were unwilling to conclude that the ads, even though coordinated in fact, were coordinated expenditures, and the deadlocked commission was unable to issue an advisory opinion. See Thomas J. Josefiak & Michael Bayes (on behalf of Am. Crossroads), *FEC Response to AO Request 2011-23*, 2011 WL 6094920 (Dec. 1, 2011), available at <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3368&START=1189803.pdf> (search "AO 2011-23") (on file with the *Columbia Law Review*).

⁴⁸. 11 C.F.R. § 109.21(d)(5)(i) (2012). Similarly, common vendor status applies only if the Super PAC's vendor—such as a pollster or media consultant—worked for the candidate, his committee, or party within the preceding 120 days. *Id.* § 109.21(d)(4)(ii).

candidate's campaign concerning the campaign's plans, projects, needs, or activities to the organization actually sponsoring the ads. If the candidate's committee goes public with that information—say, by posting its plans, projects, needs, or activities on the Internet, and indicating that supplemental spending by friendly outside groups would help the campaign in meeting its goals—that would defeat a finding of coordination. As a result, it is not surprising that despite the close structural relationship between candidates' campaigns and their supportive Super PACs there was apparently little or no coordination within the meaning of the FEC's regulations in the last election cycle.

The 2011–12 Super PAC experience underscores the need to rethink the standard of coordination to prevent megadonations to and expenditures by nominally independent groups that are effectively “disguised contributions” to candidates from breaching the wall between coordinated and independent activity erected by Congress and sustained by the Supreme Court. *Buckley*'s determination that independent spending is unlikely to benefit, and thus be a reason for gratitude from, the candidate it is intended to aid was almost certainly naïve to begin with, and is surely now inconsistent with political reality. But, as *Citizens United* underscores, the Supreme Court remains strongly committed to the contribution/independent expenditure distinction.⁴⁹ As a result, it is crucial that the distinction actually differentiates between spending by truly independent organizations from those that are effectively the alter ego of a candidate.

I propose that for any organization that (i) focuses all of its electioneering expenditures on one or a very small number of candidates, and (ii) either is staffed by individuals who used to work for the candidate, the candidate's campaign committee, or a political party in the current or past election cycle; has received fundraising support from a candidate, the candidate's campaign, or staff; or has been publicly endorsed by the candidate as a vehicle for supporting that candidate, that organization is to be treated as a coordinated organization with that candidate or candidates, and its spending treated as coordinated spending with that of the candidate or candidates it supports.⁵⁰

The thrust of the first factor is that if a committee is devoting all of its election spending to promoting a specific candidate—whether with affirmative ads or attacks on that candidate's opponent—then donations to that committee are effectively donations to the candidate. If an organization is involved in multiple election contests, then donations to the organization cannot be said to go to the aid of a specific candidate. In that case, although the organization's spending may benefit certain candidates, the link between a particular donor and a particular candidate is attenuated. But where the organization is a single-candidate committee, the connection between donor and ultimate beneficiary is

⁴⁹. See generally *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

⁵⁰. The American Anti-Corruption Act put forward by former FEC Chairman Trevor Potter presents a similar, albeit somewhat broader, proposal for redefining coordination. See Trevor Potter, *The American Anti-Corruption Act* (2012), available at https://s3.amazonaws.com/s3.unitedrepublic.org/docs/AACA_Full_Provisions.pdf (on file with the *Columbia Law Review*).

much stronger, and the donation begins to resemble *Buckley's* “disguised contribution.” Of course, if the test were limited to purely single-candidate committees, then those organizations could try to avoid a finding of circumvention by adding some nominal spending for an additional candidate. As a result, the factor needs to be expanded a bit to include committees that focus on a small number of candidates—say, two or three or four—not just one, or perhaps by focusing on a committee that devotes more than half (or some other very large fraction) of its election spending on only one candidate regardless of the total number of candidates supported.⁵¹

The second factor addresses the concern that it is possible for a committee to be formed by a truly independent group of concerned citizens to advance just one candidate, but also to stress particular issues, concerns, or campaign themes that differ from those of the supported candidate. Even though focused solely on a single candidate in a specific election, such a group might still fit the model the Supreme Court sought to protect in *Buckley*. But the involvement in the committee of individuals with recent ties to the candidate or the endorsement of the committee's work by the candidate or his staff indicates that the committee is very likely to act consistently with the preferred strategies, tactics, messages, and themes of the candidate and to act as an alter ego for the candidate's official campaign even without the explicit interactions that the law currently looks for. The ties that indicate that a committee is not truly independent of a candidate would include having staff who recently worked for the candidate, either on her campaign or in her government office; who recently worked for a committee of that candidate's party; who raised funds for a current or recent campaign of that candidate; or who recently worked for a vendor who provides campaign services to the candidate. A committee that exists solely to promote one or a very small number of candidates and is organized and operated by individuals with recent strong political ties to that candidate or candidates is very likely to be viewed by the candidate or candidates aided as providing integral support to their campaigns even in the absence of express current interaction between the independent committee and the candidate. Under those circumstances, it would be fair to say that donations to that committee should be treated as disguised contributions to the candidate.

Similarly, even without the use of overlapping staff, if the candidate or his committee endorses or approves of an organization's campaign activities on his behalf, calls on donors to give to that committee, participates in fundraising activities for it, or otherwise signals support for the organization's campaign work, that, too, indicates that the candidate considers the committee to be a part of his campaign. Even in the absence of substantive discussions about campaign strategy, involvement in decisions about advertising messages, or transmission of inside information, the candidate's endorsement of the

⁵¹ Public Citizen found that of the 112 independent committees that spent more than \$100,000 supporting or opposing federal candidates in the 2012 elections, just seven spent more than 99% but less than 100% of their resources on a single candidate. See Public Citizen, *supra* note 8, at 51–53. That number will likely change if single-candidate status becomes a basis for more regulation.

organization's work indicates that the candidate and committee are acting in concert to promote the candidate's election.

Consistent with current law, the fact that an organization engages in extensive spending in support of a candidate with ads that track the candidate's campaign themes and are consistent with his strategy does not necessarily call its independence into question.⁵² As the *Christian Coalition* court observed, "[t]he mere fact that the Coalition was singing from the same page as the [George H.W.] Bush campaign on certain issues does not establish coordination."⁵³ But when a committee exists solely to support a specific candidate and either is organized and directed by individuals with close political ties to the candidate or is recognized as a supporter by the candidate, donations to the committee pose the same dangers of corruption and the appearance of corruption as donations to the candidate's official campaign committee. Under these circumstances the committee's spending ought to be treated as coordinated with that of the candidate.

This proposed redefinition of coordination is a fairly modest change that would not affect all Super PACs, as many support multiple candidates. American Crossroads, which was the second-best financed Super PAC in 2011–12, supported at least a dozen candidates in the 2012 general election.⁵⁴ Such multicandidate Super PACs would be unchanged by this proposal. In particular, it does not address spending by Super PACs that "were unambiguously allied and intertwined with" one or the other of the major parties; such party-allied PACs spent \$187 million, or more than 29% of all Super PAC spending in the 2011–12 election cycle.⁵⁵ Political parties are increasingly treating the activities of party-allied Super PACs and other party-allied independent groups as a key part of their election strategies. For example, the recently released Republican Party's review of the 2012 election devoted a substantial section to "friends and allies," noting that this "multitude of effective third-party groups . . . serve as critical components of the Republican Party" and "applaud[ed] the efforts of these organizations to augment the traditional political party infrastructure."⁵⁶ Party-allied Super PACs provide a means of circumventing the laws governing political party campaign finance practices much as single-candidate PACs are vehicles for

⁵² Cf. *Colo. Republican Fed. Campaign Comm. v. FEC (Colorado Republican I)*, 518 U.S. 604, 614 (1996) (plurality opinion) (finding political party committee's spending on advertising critical of likely Senate candidate of opposing party was developed by party "independently and not pursuant to a general or particular understanding with a candidate" and therefore could not be considered coordinated with candidate). Although the concept of a political party spending independently in support of its own candidate articulated by the *Colorado Republican I* plurality is an odd one, it does not preclude my proposal. Party campaign committees typically support a host of candidates; they are less likely to be stalking horses for specific candidates. As a result, it cannot be said that donations to the party committee are no more than disguised donations to specific candidates.

⁵³ *FEC v. Christian Coal.*, 52 F. Supp. 2d 45, 95 (D.D.C. 1999).

⁵⁴ See Ctr. for Responsive Politics, 2012 Outside Spending, *supra* note 9 ([detailing Super PAC spending during 2012 election cycle](#)).

⁵⁵ See Public Citizen, *supra* note 8, at 10.

⁵⁶ See Republican Nat'l Comm., Growth & Opportunity Project 44 (2013), available at <http://growthopp.gop.com/default.aspx> (on file with the *Columbia Law Review*).

evading the rules governing contributions to candidates. However, the proper campaign finance role of the political parties is a more complex subject, beyond the scope of this piece.⁵⁷

Yet, although limited in scope, the proposal does address a crucial point. A fundamental feature of the Federal Election Campaign Act (FECA) is its requirement that federal candidates centralize their donations, spending, and campaign finance by designating a single authorized campaign committee.⁵⁸ This was intended to prevent the use of multiple campaign committees to circumvent campaign finance restrictions and requirements. In 1940, after Congress first imposed limits on donations to and spending by national party committees, the parties and their presidential candidates responded by proliferating a host of independent committees, like the Associated Willkie Clubs of America and the National Committee of Independent Voters for Franklin D. Roosevelt and Henry A. Wallace that effectively evaded those limits.⁵⁹ That set a pattern, followed in 1944 and after. As one leading campaign finance scholar found in 1960, a principal effect of limits was “to encourage an increase in the number of political organizations through which gifts are received and political campaigns are carried out.”⁶⁰ The resulting “multiplicity of campaign groups contributes to diffusion of control, hence to inefficiency and irresponsibility.”⁶¹ Not only were limits avoided but the flow of campaign money became more difficult to trace, even with disclosure requirements.

The central thrust of FECA’s single authorized committee requirement was to make contribution limits effective and candidate campaign finance activity more transparent. Single-candidate Super PACs staffed by former aides to the candidate threaten to undo this signal accomplishment by enabling candidates to have, in effect, more than one campaign committee. So, too, they subvert the contribution/expenditure and coordinated/independent expenditure distinctions central to campaign finance law by permitting “disguised contributions” that raise all the corruption dangers of contributions to candidates to be treated as independent expenditures.

IV. CONCLUSION

The Supreme Court’s insistence that independent spending does not pose dangers of corruption or the appearance of corruption has been doubtful from the start, as candidates are surely aware of and gratified by the support

⁵⁷ The proposal also does not address the activities of single-candidate independent committees that are not Super PACs, but operate instead as 501(c) organizations. See, e.g., Public Citizen, *supra* note 8, at 11 (indicating that in 2012 election, single-candidate committees other than Super PACs spent \$65 million). These groups present complex constitutional and regulatory issues beyond the reach of this piece.

⁵⁸ See 2 U.S.C. § 432(e)(1) (2006). The law makes one exception, permitting candidates to establish joint fundraising committees with other candidates. See *id.* § 432(e)(3)(A)(ii).

⁵⁹ See Louise Overacker, Campaign Finance in the Presidential Election of 1940, 35 *Am. Pol. Sci. Rev.* 701, 708–09 (1941).

⁶⁰ Alexander Heard, *The Costs of Democracy* 348 (1960).

⁶¹ *Id.*

provided by independent groups, much as members of the public may be concerned about how that gratitude could affect official decisionmaking by successful candidates after the election. But there is at least some constitutional claim to recognizing the expressive and associational rights of groups—like the Christian Coalition—that have existence independent of a specific election campaign and policies and goals apart from and in addition to the election of a single, specific candidate. Single-candidate committees established and operated by recent former staff to the candidate or hailed by the candidate as organizations to which financial backers of the candidate should send their funds, however, are not *independent* in the sense that *Buckley* sought to protect. Rather, their spending flouts *Buckley*'s contribution/expenditure distinction.

The explosion of independent spending funded by Super PACs and other organizations in the last two election cycles raises new questions about the effectiveness of contribution limits and, perhaps, about the value of maintaining them.⁶² But if the law is to continue to limit contributions because of the dangers of corruption and the appearance of corruption they pose, and to maintain the integrity of the contribution/expenditure distinction that has been a foundational part of our campaign finance law for nearly four decades, it is essential to redefine coordination to address the emergence of single-candidate Super PACs. The proposal in this Essay is intended as a contribution to that process.

Preferred Citation: Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88 (2013), http://www.columbialawreview.org/coordination-reconsidered_Briffault

⁶² President Obama's former top political adviser recently called for the elimination of contribution limits. See Paul Blumenthal, David Axelrod: Remove Contribution Limits to End Super PACs' Game, *Huffington Post* (Feb. 20, 2013, 12:39 PM), http://www.huffingtonpost.com/2013/02/20/david-axelrod-campaign-contributions_n_2725613.html (on file with the *Columbia Law Review*). This has long been the position of anti-campaign finance regulation groups. See, e.g., Sarah Lee, CCP and David Axelrod: A Meeting of Minds, *Center for Competitive Politics* (Feb. 21, 2013), <http://www.campaignfreedom.org/2013/02/21/ccp-and-david-axelrod-a-meeting-of-minds> (on file with the *Columbia Law Review*). The Supreme Court's recent decision to note probable jurisdiction in *McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012), prob. juris. noted, 81 U.S.L.W. 3452 (U.S. Feb. 19, 2013) (No. 12-536), which challenges the federal ceiling on the total donations an individual may make to all candidate committees in the aggregate in a biennial election cycle, and the comparable ceilings on aggregate donations to party committees and other federal committees, raises the possibility that the Supreme Court may be rethinking its approach to contribution limits as well. The predecessor to these aggregate ceilings—FECA's limitation on total individual contributions to candidates, party committees, and other federal political committees—was upheld by the Supreme Court with little discussion in *Buckley v. Valeo*, 424 U.S. 1, 38 (1976) (per curiam). Justices Thomas and Scalia have long contended that contribution limits, like expenditure restrictions, should be subject to strict scrutiny and invalidated. See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 265, 266–67 (2006) (Thomas, J., joined by Scalia, J., concurring in the judgment). Justice Kennedy has also expressed considerable doubt about *Buckley*'s approach to contribution limits. See *id.* at 264–65 (Kennedy, J. concurring in the judgment).